SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 22.

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, and B. B. STEINER, Individually and As Co-Partners Doing Business As CUMBERLAND BATTERY MANUFACTURING COMPANY, and CUMBERLAND BATTERY MANUFACTURING COMPANY, a Partnership, *Petitioners*,

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONERS' BRIEF AND ARGUMENT ON THE MERITS.

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OPINIONS BELOW.

The opinion of the District Judge is reported in 111 Fed. Supp., beginning at page 546. The opinion of the Court of Appeals for the Sixth Circuit is reported in 215 F. 2d beginning at page 171.

STATUTES INVOLVED.

The statutes which this case involves are:

The Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251 *et seq.* (§§ 2 and 4).

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201 *et seq.* (§§ 3, 7, 11, 15, and 17).

The provisions of the statutes involved are lengthy, and their pertinent text is set forth in the appendix hereto.

QUESTIONS PRESENTED.

The questions presented for review involve interpretations of the provision of the Fair Labor Standards Act of 1938 ((c) 676, 52 Stat. 1060; (c) 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201, *et seq.*), as amended by the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C., Supp. V, 251, *et seq.*) and the amendment of 1949 (63 Stat. 910-11). Specifically, three questions are presented:

1. Under the provisions of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, does time spent by petitioner's employees at its battery manufacturing plant in changing from street clothes into work clothes prior to punching the time clock at the beginning of the work day, and in taking shower baths and changing from work clothes to street clothes after punching out the time clock at the end of the work day, constitute compensable "time worked" under the amended Act?

2. Are the activities described in paragraph 1 above "preliminary" and "postliminary" activities and, if so, are they non-compensatory in the absence of a custom or prac-

tice at petitioner's establishment, or a written contract, making such activities compensatory?

3. Did the Congress, by the 1949 amendment to Sec. 3 (o) of the Fair Labor Standards Act intend to limit and restrict the provisions of Section 4 (a) of the Portal-to-Portal Act of 1947 (relating to future actions), as distinguished from Section 2 of the amendment (relating to claims pending or arising prior to the passage of the amendment), or should Section 4 (a) be construed the same as Section 2 of the Portal-to-Portal Act, insofar as the scope of the legislation is concerned?

STATEMENT OF THE CASE.

Petitioners are engaged in the manufacture of batteries for automobiles at a plant located in Nashville, Tennessee. This action was instituted by Maurice J. Tobin, then Secretary of Labor, against petitioners by the filing of a complaint in the United States District Court for the Middle District of Tennessee, charging violations of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 as amended. The substance of the charges was that petitioners were employing workmen for work weeks longer than forty hours without the payment of additional overtime compensation and that petitioners failed to make, keep and prepare accurate records of the hours worked in excess of forty per week. The relief prayed for was a permanent injunction restraining petitioners from future violations. This was the basis for Federal jurisdiction in the Court of first instance.

Petitioners employed thirty to forty regular workmen who reported for work at 7:30 o'clock in the morning and ended the workday at 4:00 o'clock in the afternoon. At the time they began work, that is at 7:30 o'clock A. M.,

and at the time their work ended, that is 4:00 o'clock P. M., they punched a time clock (R. 25). The manufacturing process for storage batteries involves the handling of toxic matter, such as sulphuric acid and lead oxide. This matter damages clothes if it is spilled on them. Petitioners operate a salvage business and laundry in a building adjacent to the storage battery plant (R. 50, 273) and, as a convenience to employees, petitioners furnished those desiring to change clothes before reporting for work with salvaged clothes that had been laundered. Petitioners did not require any employee to change clothes and some employees did not follow this procedure.

(R., 58-65a, 122-123a-217a, 225-229a, 259, 107a.)

The parties to the litigation entered into and filed the following stipulation of facts.

Stipulation.

(Filed November 14, 1952.)

1. It is hereby stipulated and agreed by counsel in open Court, that this case may be submitted to the Court for decision upon the certified record "In the Matter of Morris Steiner *et al.*, d/b/a Cumberland Battery Manufacturing Company, P. C. -472, U. S. Department of Labor," as supplemented by the depositions of not more than three expert witnesses called by each side. As two of its three witnesses the plaintiff agrees to call Dr. Miller Robinson and Eugene Plauche for the purpose of making them available for cross and re-direct examination.

2. It is agreed that defendants have never recorded the time spent by their employees in changing clothes in the morning, or in showering and changing clothes at night. Further, defendants have never considered this time as "work" and have never paid for it. Employees, in many

instances, have worked forty hours per week exclusive of such time.

3. Defendants have never issued any order; nor do they make any requirement requiring their plant employees to use the clothes-changing and showering facilities they make available. Most of the employees do regularly change from their street clothes to work clothes before reporting to their work places in the morning, and most of them do regularly take a shower in defendants' shower room and change back to street clothing after leaving their work places in the evening. Some employees do not follow this procedure.

These defendants make no requirement of any kind as to the type of clothes which are to be worn by their employees during work hours and the clothes or type of clothes which are worn by their employees is entirely optional with the employees.

In those instances where special equipment is required such as respirators, gloves, etc., defendants' employees are paid for the time taken in putting on such special equipment and in removing the same. This, however, is done during the work shift and as a practical matter and involves very little time.

4. The depositions of expert witnesses are to be taken within a three-weeks period from the date of this stipulation.

5. The brief of counsel for the plaintiff is to be filed with the Court within two weeks after the date of filing of the last deposition. Counsel for the defendants will file his brief within a week thereafter.

(R., 9a-10a.)

Those employees whose duties required them to constantly handle toxic matter were furnished masks (a sort

of gas mask or respirator), aprons and gloves which protected them from the hazards of handling the matter. This certain or *special clothing* and equipment necessary to the employees' principal activity of manufacturing batteries was donned and taken off during the workday after the employee had punched the time clock in and before he had punched out and the employee was compensated for the time so spent.

(R., 220a, 264a, 67a, paragraph 3, Stipulation of Facts.)

The wearing of the scrap clothing did not enable the employee to more efficiently perform his duties in manufacturing batteries, but merely protected the employee's street clothing from damage from acids which might be spilled.

(R., 77a, 85a, 25a, 151a, 180a, 233a, 265a, 331a.)

No custom or practice, or collective bargaining agreement, existed which required petitioners to pay compensation for time spent in changing clothes and taking shower baths.

(Stipulation, paragraph 2, R., 9a, 13a, 168a, 258a.)

Opinion of District Court.

The District Judge held that the time spent by employees in changing clothes and taking shower baths was compensable under the Fair Labor Standards Act, notwithstanding the Portal-to-Portal amendment. The basis of the Court's opinion adequately appears from the following quotation taken therefrom:

> "The general requirement of bathing and clothes-changing in storage battery plants is not prompted by mere desire for cleanliness or personal hygiene. Those considerations apply to all industry, and time spent for such reasons is generally considered preliminary

and postliminary to the actual working period. But the changing and bathing required of employees in a storage battery factory is occasioned by the poisonous substances used in the manufacturing process and is therefore an integral part of that process and should be considered a part of the days' work."

(R., 221a.)

The District Judge approached the solution of the problem from its *economic* viewpoint, saying:

"The manufacture of wet storage batteries is hazardous work and the expense of necessary precautions against such hazards *should be added* to the cost of the product and ultimately paid by those who use such batteries."

(R., 222a.)

Opinion of Court of Appeals.

The Court of Appeals, speaking through District Judge Ford, rested its affirmance largely upon the premise that Section 5788.15 of the Tennessee Code required every employer to provide adequate and sanitary shower facilities when workers are exposed to excessive heat, or to skin contamination with infectious, irritating, or toxic material, and Section 6852 (d) of the Tennessee Code made lead poisoning an occupational disease compensable under the Tennessee Workmen's Compensation Law. The Court therefore concluded:

"That changing of clothes and taking of shower baths at the time and in the manner herein described are regular practices which are recognized as essential safeguards against the serious occupational hazards to which appellants' employees are daily subjected in the performance of their duties is sufficient to render them an integral and indispensable part of the principal activities which they are employed to perform, within the meaning of the Portal-to-Portal Act, and

time spent in such activities is time worked within the meaning of the Fair Labor Standards Act, as amended."

(R., 272.)

SUMMARY OF ARGUMENT.

1. The parties have stipulated that petitioners make no requirement of their employees with respect to clothes changing and using showering facilities which they make available, and that the type of clothes which are to be worn by their employees during working hours "is entirely optional with the employees."

2. The parties have also stipulated that in those instances where *special equipment* is required, such as respirators, gloves, etc., petitioners' employees are paid for the time taken in putting on such special equipment and in removing the same, such activities being done during the work shift with respect to which accurate records are kept and compensation is included in the wage rate.

3. The Portal-to-Portal Amendment of 1947 to the Fair Labor Standards Act was intended to render noncompensable those preliminary and postliminary activities which this Court had held compensable in *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local 123 et al.*, 321 U. S. 590; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161, and *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. The Congressional findings and declaration of policy specifically stated that the purpose of the amendment was to conform the Fair Labor Standards Act to long-established customs, practices and contracts between employers and employees, under which preliminary and postliminary activities (such as clothes changing and bathing) were not regarded as time worked since they were usually reflected in the wage scale.

4. For practical purposes (and perhaps constitutional apprehensions), Congress dealt with such claims arising prior to May 14, 1947 under Section 2 of the Amendment, and claims arising thereafter under Section 4 of the Amendment. Prior to the present case Federal Courts generally had made no distinction between the types of preliminary or postliminary activities embraced within Section 2 and Section 4 of the legislation, holding that the type of activities covered were the same under each section. For example, see *McComb* v. *C. A. Swanson & Son*, 77 Fed. Supp. 716.

5. Clothes changing and bathing were included in the categories of preliminary and postliminary activities in this Court's decisions in *Muscoda*, *Jewell Ridge*, and *Mt. Clemens*, referred to in paragraph 3 above. Such activities may or may not be indispensable to the productive work for which the employee was hired, but manifestly they do not lose their character as preliminary and postliminary activities because of indispensability to productive work, and they should not be excluded from the scope of the remedial legislation on the basis of dispensability or indispensability.

6. The legislative history of the Portal-to-Portal Amendments expressly discloses the Congressional intent to include and classify clothes changing and bathing as preliminary and postliminary activities irrespective of dispensability to productive work.

7. If clothes changing and bathing may or may not be included in productive work, based upon court findings as to dispensability, or the lack of it, such interpretation would enable the employer and the employee, under Section 3 (o) of the 1949 Amendment to the Fair Labor Standards Act, to eliminate payment for productive work by custom, practice, or collective bargaining agreements. It is obvious that Congress intended no such interpretation.

ARGUMENT.

The amendment to the Fair Labor Standards Act which Congress passed in 1947 and which is known as the "Portal-to-Portal Amendment" was the direct result of three decisions of this Court, they being:

Tennessee Coal, Iron & Railroad Co. v. *Muscoda Local 123 et al.*, 321 U. S. 590.

Jewell Ridge Coal Corp. v. *Local No. 6167*, 325 U. S. 161.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680.

Under the foregoing decisions this Court found that such preliminary activities as changing into working clothes, putting on aprons and overalls, removing shirts, sharpening tools, and other similar activities, and such postliminary activities as going to the bath house, taking shower baths, and other similar activities were clearly work falling within the definition found in the opinion of Mr. Justice Murphy in the Muscoda case, and hence "they constitute work that must be accorded appropriate compensation under the statute." Therefore the activities involved in the present case would have been compensable *prior* to the Portal-to-Portal amendment.

Thereupon Mr. Gwynne, a Congressman from Iowa, introduced House Bill 3157 in the House of Representatives. No Senate Bill was introduced, and it was House Bill 3157 which became the Portal-to-Portal Amendment to the Fair Labor Standards Act. Referring to the three recent decisions of this Court, H. R. 3157, in stating the Congressional findings and declaration of policy, said:

"The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted

judicially in disregard of long established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so *interpreted* or claims arising *under such interpretation* were permitted to stand (1) the payment of such liability would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment and the earning power of employees; * * *"

(Chap. 52, Sec. 1, 61 Stat. 84, May 14, 1947.)

Congress thereupon proceeded to deal with the matter, for the sole purpose of setting aside the result of this Court's decisions by (a) invalidating any existing claims accruing prior to May 14, 1947, and (b) amending the Fair Labor Standards Act so as to eliminate any such claims in the future.

Claims Arising Prior to May 14, 1947.

Section 2 of the Portal-to-Portal Amendment invalidated all such existing claims excepting only activities which were compensable by either an express provision of a written or nonwritten contract in effect at the time of such activity between the employee and the employer or under a collective bargaining agreement, or in effect under a custom or practice at the establishment where the employee was employed (Chap. 52, Sec. 2, 61 Stat. 85).

Scores of reported decisions have upheld the validity, the purpose, and the effect of this legislation with respect to claims arising prior to May 14, 1947. Illustrative and typical is the case of *Bateman* v. *Ford Motor Co.*, which arose in the Sixth Circuit and which was heard by *five*

District Judges—O'Brien, Leberle, Pickard, Koscinski, and Levin—76 Fed. Supp. 178.

District Judge Pickard, announcing the unanimous opinion of all five District Judges, said:

> "These two cases are representative of the deluge of Fair Labor Standards actions catapulted into our judicial tribunals by interpretations of the Supreme Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515."
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> * * * * * * *
>
> "Congress, therefore, knowing the peril to be imminent, concluding that it could not await the usual turning of the wheels of justice, determined that the Court be relieved of the burden of 'excessive and needless litigation and champertous practices' and business relieved of a heavy burden of doubt. In remedy it amended the Fair Labor Standards Act by the Portal-to-Portal Act, B. L. 49, 80, Con., Ch. 52, 29 U. S. C. A., Secs. 201 *et seq.*, 251 *et seq.*, the main purpose of which was to limit employee's right to classify walking, *washing*, punching the clock, *changing clothes;* etc., 'as time worked' for which they were entitled to receive overtime compensation and liquidated damages unless such 'labor' was covered by * * *" a contract or a custom or practice, etc.
>
> 76 F. Supp., at page 180.

This *five Judge* unanimous decision was affirmed by the Circuit Court of Appeals for the Sixth Circuit on August 2, 1948 (169 F. 2d 266), and certiorari was denied by this Court on January 3, 1949 (335 U. S. 902).

The decisions have been uniform in construing Sec. 2 of the Portal-to-Portal Act as excluding from hours worked prior to May 14, 1947, preliminary activities such as clothes changing and taking shower baths. In the Sixth Circuit, for example, in *Lasater et al.* v. *Hercules Powder Co.*, decided December 6, 1948, 171 F. 2d 263, which in-

volved clothes changing in order to manufacture TNT, the Court said:

> "But, as the District Court stated, the suit was based upon the Fair Labor Standards Act and not upon contract. The proof disclosed no express contract, written or non-written, and no custom or practice for payment of compensation for overtime which would bring appellant's claim within the exceptions set forth in the Portal-to-Portal Act. Since the activities of the employees had not been previously compensable by virtue of contract, custom, or practice, Sec. 2 of the Portal-to-Portal Act precludes all liability of the employer for payment of such overtime compensation."

On April 14, 1949, the Sixth Circuit Court of Appeals, in *Newsom et al.* v. *E. I. duPont,* 173 F, 2d 856, denied a claim arising under Sec. 2 of the Portal-to-Portal Act which involved preliminary and postliminary activities which the Court in its opinion described as follows:

> "At the end of every particular shift, it was necessary that plaintiffs remove grease, gloves, wrappings and other special equipment and appliances, and in a great many instances they were required by the defendant's regulations to take a shower bath as a safety precaution for the benefit of the defendant."

In deciding the present case the Court of Appeals for the Sixth Circuit stated that its previous decisions in *Newsom* v. *E. I. duPont, supra,* and *Lasater* v. *Hercules Powder Co., supra,* were not applicable because the claims involved in those cases "arose under Sec. 2 of the Portal-to-Portal Act (29 U. S. C. A., Sec. 252) and the questions therein presented and decided are not here pertinent." (R., 269.)

Thus the effect of the Court's holding was that postliminary and preliminary claims arising prior to May 14,

1947, and involved under Sec. 2 of the Portal-to-Portal Act were not necessarily excluded under Sec. 4 of the Portal-to-Portal Act which dealt with similar claims arising after May 14, 1947. *Petitioners insist that such conclusion is erroneous.*

Claims Arising After May 14, 1947.

Claims arising subsequent to May 14, 1947 (the effective date of the Act), are governed by Section 4 of the Portal-to-Portal Act, the pertinent provisions being as follows:

Section 4—

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged on or after May 14, 1947—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time or any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

(May 14, 1947, Ch. (c) 52, Sec. 4, 61 Stat. 86.)

At the time the foregoing amendment was passed the case of *McComb* v. *C. A. Swanson & Sons*, 77 F. Supp. 716, was pending in the District Court in Nebraska. Like the present case, it was a suit instituted by the Administrator of the Wage and Hour Division of the Federal Department of Labor, seeking to enjoin violations of the Fair Labor Standards Act based upon the decision of this Court rendered June 10, 1946, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. *Petitioners urgently insist that a reading of this decision will clearly indicate the error into which the Court of Appeals for the Sixth Circuit has fallen in the present case.*

The *Swanson* case involved clothes-changing activities made mandatory by the laws of Nebraska. *Upon the passage of the Portal-to-Portal Act, Swanson amended its answer so as to rely upon the amendment and thereupon the Administrator broadened the complaint so as to apply to activities occurring both before and subsequent to May 14, 1947.* This required the Court to pass upon and interpret the provisions of both Section 2 and Section 4 of the Amendment. The Court construed Section 4 as having the same legislative sweep and meaning as Section 2, the only difference being that Section 2 applied to activities

prior to May 14, 1947, and Section 4 applied to the same type of activities subsequent to that date. The Administrator's action was accordingly dismissed, *and no appeal was prayed by the Administrator.* The failure of the Administrator to appeal the decision, and the clear and cogent reasoning of District Judge Delehant quickly established that decision as the leading authority on the proper interpretation of Sections 2 and 4 of the Act, and, so far as a diligent search has revealed, no subsequent decision, District or Appellate, by any Federal Court has challenged the authority of the *Swanson* case in the proper interpretation of Section 4 of the Act until the decision in the present case. Further, in the present case, neither the District Judge nor the Court of Appeals referred to or commented upon the *Swanson* decision.

As stated, the *Swanson* case involved the preliminary acitvity of clothes-changing mandatority required by both Federal and State laws and supervised by Federal inspection. In construing Section 4 of the Act the Court said:

> "Now the defining antecedent of the phrase 'principal activity or activities' in Section 254 (a) (2) appears in Section 254 (a) (1) in the language: 'The principal activity or activities which such employee is employed to perform.' Those words are not abstruse, obscure, or uncertain. They refer to the productive work in behalf of the employer which he hires the worker to do. For the machinist, it is the work at his bench or lathe; for the store clerk, the sale of goods; for the carpenter, the labor in the erection or repair of a building. And for the poultry eviscerator, it is the task to which he or she is assigned in the eviscerating room, be it the hanging of birds, decapitation, disemboweling, cleaning the rooms, or any one or more of the multitude of operations in the rooms serviced.
> * * *

"'Preliminary' and 'postliminary' are not words of dubious, or recondite or confusing significance, even if the latter is not frequently employed. Derivatively, 'preliminary activities,' in the present setting are those activities which are engaged in before the threshold of, or the entrance upon, the day's principal activities."

(77 F. Supp., at 731-732.)

* * * * * * *

"Of 'postliminary' it need only be observed that it is the antonym of 'preliminary' and that it characterizes the activities after the close of the principal work of the day generally in the inverse order of their performance at its opening, including frequently washing the hands and face of the worker."

(77 F. Supp., at 733.)

The Court thereupon concluded that notwithstanding the changing of clothes and putting on of uniforms was required *as a health measure* by both Federal and State legislation, such activities were clearly preliminary and postliminary in character and therefore were not compensable in absence of a prevailing custom or practice, or a collective bargaining agreement requiring compensation therefor.

In point of time, the next case construing Section 4 of the Act was *Tobin* v. *King Packing Co.* (107 F. Supp. 369), decided by the District Court on May 27, 1952. The question in that case was whether or not the time spent by employees, called knifemen, in sharpening their knives outside their regularly scheduled shift time, was compensable or whether on the contrary such activity was preliminary or postliminary to the employees' principal activities and thus excluded from compensation by Section 4 of the Portal-to-Portal Act. The District Judge held that such activities were preliminary and postliminary in character even though the sharpening of knives was directly related

to and required by the nature of the principal activities engaged in and therefore not compensable.

The Secretary of Labor appealed the case to the Court of Appeals for the Ninth Circuit, and that Circuit, on October 21, 1954, *affirmed* the decision of the District Court, the case being entitled *James P. Mitchell, Secretary of Labor, etc., Appellant,* v. *King Packing Company, Appellee,* 216 F. 2d 618.

The Ninth Circuit rejected the reasoning of the Sixth Circuit in the present case. The *rationale* of the Ninth Circuit's opinion in the *King* case (now before this Court for review on writ of certiorari) may be summarized as follows:

1. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, gave examples of various activities which were termed "preliminary"—one of which was "assembling and sharpening tools."

2. The Portal-to-Portal Act, passed subsequent to the Mt. Clemens decision, intended to make non compensable the preliminary activities which the Court had held compensable in the Mt. Clemens case, and consequently "preliminary activities" as used in the Portal-to-Portal Act had reference to those activities described as preliminary by this Court in the Mt. Clemens decision.

3. All of the activities described by this Court in the Mt. Clemens case as "preliminary" may be considered indispensable, and therefore the words "preliminary" and "postliminary," as used in the Portal-to-Portal Act could not reasonably be interpreted to exclude all activity found to be indispensable to the performance of productive work.

4. Sharpening of knives, as a preliminary activity to productive work, while indispensable to such

productive work for which the employees were hired, was nevertheless a preliminary activity within the meaning of the Portal-to-Portal Act, and therefore not compensable in the absence of a prevailing custom or contractual obligation.

Ciemnoczolowski et al. v. *The Q. O. Ordnance Corporation*, decided April 29, 1955, by the Eighth Circuit, involving production line operators referred to as "Powder Line Operators" is directly in point. The activities were the same—changing clothes and taking shower baths. In the opinion the Court said:

> "The production line operators which are referred to in Plaintiffs' brief as 'Powder Line Operators,' and production inspectors are claiming compensation for a forty-five minute period occurring every shift, which time was devoted to removing their clothing at the beginning of the shift and donning their working clothes, and removing their working clothes, taking a shower bath, and dressing in their street clothes at the end of the shift. The trial court found that this time was spent in 'preliminary' and 'postliminary' operations for which there was neither a contract nor a custom for payment under the Portal to Portal Act."

The issue was the same as the one involved in this case. We quote:

> "As plaintiffs aptly state in their brief—'The basic issue on this point is whether or not the clothes changing and showering activities were part of the principal activities which these workers were employed to perform.'"

In the pending case clothes changing and showering were not required though they were mutually beneficial. In the *Ciemnoczolowski* case such activities were *mandatory*—as stated by the Court:

"The powder line workers who engaged in melting, pouring and processing explosives were required to change their clothes and take a shower after their shift. They were required to change their clothes as a safety precaution against explosions which might be caused from sparks from metallic objects on or in conventional clothing. They were required to take a shower as a safety measure for the employee's own health to avoid after effects of powder remaining on the person of the employee."

The Eighth Circuit held these preliminary and postinary activities non-compensable under the Portal-to-tal Act upon the following reasoning:

"If the term 'principal activity' was intended to include *ipso facto*, activity necessarily incident to the principal activity there would be no possibility of applying the 1949 Amendment of the Fair Labor Standards Act quoted above to necessary preliminary activities. And the application of Sec. 254(a)(1) prohibiting the inclusion of necessary preliminary and postliminary activities in compensable time for principal activities unless so recognized by contract or custom would likewise be circumscribed. As stated in *Mitchell v. King Packing Co.*, 216 F. 2d 618, l. c. 621:

" 'In our view the term "preliminary" or "postliminary" cannot be interpreted so as to exclude all activity "indispensable to the performance of productive work." To do so would deny effect to the intended meaning of the Portal-to-Portal Act. All of the activities designated as "preliminary" by the Supreme Court in the Mt. Clemens case can be considered indispensable. See *McComb v. S. A. Swanson & Sons*, D. C. D. Neb., 1948, 77 F. Supp 716, 733.'

"We must conclude that the necessity of an activity to the performance of the principal activity will not alone make the former a part of the principal activity."

The most recent decision involving compensability for clothes changing and showering is that of the Fifth Circuit Court of Appeals in *Mitchell, Secretary, etc.*, v. *Southeastern Carbon Paper Company, Inc.*, decided June 28, 1955 (not yet reported), in which that Court held such preliminary and postliminary activities non-compensable.

While the Fifth Circuit distinguished the *Southeastern Carbon Paper Company* case from both the present case and the *King Packing Co.* case, the Court in the course of its opinion said:

> "Without benefit of court decisions interpreting these words as meaning something different from their common everyday intendment, and without referenee to legislative history, it would seem mere cavilling to contend that a person engaged to manufacture carbon paper in a manufacturing plant did not have as his principal activity the doing of those things which turned the ink and paper into carbon paper, and that a statute referring to activities that might engage his attention preliminary to or postliminary to his principal activity would not include the changing into such work clothes as he used and washing or bathing to remove the soil encountered while he was engaged in such principal activity after the day's productive work was over."

Legislative History.

The Court of Appeals in the present case based its adverse interpretation of Section 4 of the Act upon a statement made by Senator Cooper of Kentucky while H. R. 3157 was under debate in the United States Senate. The learned Court of Appeals relied upon this rather general statement made by Senator Cooper, apparently under the mistaken belief that he was the *author* of a Senate Bill which was then under discussion. This Court has on many occasions cautioned against the use of casual statements

from the floor in Congressional debates as an aid to the interpretation of a statute. For example, in the *Schwedmann Bros.* case (341 U. S. 384), the late Justice Jackson and Justice Minton concurring, said:

> "But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."

However, Senator Cooper, while supporting the legislation, was not the author of the bill, which came from the House of Representatives, where Congressman Gwynne was the author. In the interpretation of Section 4 of the Act, the debate by the author of the bill, made after the filing of the Conference Report, in Congress on May 1, 1947, *conclusively* demonstrates the erroneous conclusion of the learned Court of Appeals in its interpretation of Section 4 of the Act in the present case.

> "Mr. Michener: Mr. Speaker, I yield ten minutes to the gentleman from Iowa (Mr. Gwynne), *the author of this bill.*
>
> * * * * * * *
>
> "Mr. Gwynne, of Iowa: The next part of the bill has to do with portal-to-portal claims.
>
> * * * * * * *
>
> "This bill divides them up and provides that, one, riding, walking and traveling to the place of employment where the principal activity takes place and walking and traveling away from the place of the principal activity, or, two, preliminary activities to the principal activity and activities postliminary to the principal activities; as to those activities at the beginning and end of the day prior to the whistle, you might say, and subsequent to the whistle, *the same treatment is given as was given to existing portal-to-*

portal claims. As to the main part of the working day, as to the principal activity for which any particular employee is employed, this law does not operate.

* * * * * * *

"Mr. Pace: It was not entirely clear to me on the portal-to-portal pay what was done with the future handling of those claims that *immediately precede* the moment of employment, not the walking and the riding, but the preliminaries to start work. What position did the Committee of Conference make of that type of claim?

"Mr. Gwynne, of Iowa: *That type of portal-to-portal claim is barred.* In existing claims, the entire thing is barred, even though the so-called portal-to-portal claim may arise *in the middle of the day*, during the hours for which the man is employed. In future claims this riding or walking or travel to principal place of employment is barred, and barred with it are preliminary activities and postliminary activities.

"Mr. Pace: Even though it involves the *laying out of work* the man is going to undertake in the next few minutes, the laying out of garments to work on, that claim would be barred?

"Mr. Gwynne, of Iowa: It is barred *unless* there was an agreement or custom to pay for it.

"Mr. Pace: Does the gentleman think that should be handled through collective bargaining?

"Mr. Gwynne, of Iowa: No. The whole thought is that those claims are all barred. I mean as to existing claims as to activities for which the employer has not agreed to pay.

"Mr. Pace: I understand that, but I mean in the future; it is barred in the future unless there is an agreement between the employer and the employee?

"Mr. Gwynne, of Iowa: An *agreement or custom*" (Emphasis added).

93 *Congressional Record*, 4388-4389.

After the foregoing debate, Congressman Walter, one of the House conferees, in discussing the Conference Report (five weeks after Senator Cooper's statement on the floor of the Senate), made the following statements to the House of Representatives while it had under consideration House Bill 3157, *as amended by the Conference Report*:

> "Mr. Walter: Mr. Speaker, I do not believe any conference report—at least there have not been many presented to this House for consideration—has received the care that was given this legislation.
>
> * * * * * * *
>
> "* * * If this report does not state the very clear ideas of the two bodies, then I do not think it is possible to state them in the English language.
>
> * * * * * * *
>
> "Mr. Speaker, the third point relates to the key words in Section 4, (a), namely, principal activity or activities. It is intended that these words shall be interpreted *with due regard to generally established compensation practices in the particular industry and trade.* The intent is that consideration must be given to such *prevailing compensation practices in determining what constitutes, or when any particular employee begins or ends his principal activity or activities.* In other words, the realities of industrial life, not arbitrary standards, are intended to be applied in defining the term 'principal activity or activities.' In this way we will avoid having another portal-to-portal situation in the future" (Emphasis added).
>
> 93 *Congressional Record*, p. 4389.

Thereupon, at the conclusion of the debate, Mr. Michener was careful to point out that the foregoing statements made by Congressmen Gwynne and Walter were made for the express purpose of clarifying the Congressional intent, and would be most helpful in arriving at the intent of the Congress. We quote this statement of Congressman Michener:

"Mr. Michener: Mr. Speaker, I have been in Congress a long time and I have never known a more prolonged, yet a diligent, conference on any legislation where there was disagreement between the two Houses. * * * The explanation of this compromise bill made in this debate by the gentleman from Iowa (*Mr. Gwynne*), the gentleman from Massachusetts (*Mr. Goodwin*), and the gentleman from Pennsylvania (*Mr. Walter*), all members of the Judiciary Committee, and the Conference Committee will be most helpful in arriving at the intent of the Congress. In fact,

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bill made in this debate by the gentleman from Iowa (*Mr. Gwynne*), the gentleman from Massachusetts (*Mr. Goodwin*), and the gentleman from Pennsylvania (*Mr. Walter*), all members of the Judiciary Committee, and the Conference Committee will be most helpful in arriving at the intent of the Congress. In fact, their statements are brief when compared with the prepared statements of the conferees, and are most clarifying."

93 *Congressional Record*, p. 4390.

The 1949 Amendment to the Fair Labor Standards Act.

In 1949 Congress further amended the Fair Labor Standards Act by adding paragraph "(o)" to Section 3 of the Act, as follows:

"(o). Hours Worked. In determining for the purposes of Sections 6 and 7 the hours for which an employee is employed there shall be excluded any time spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee."

(63 Stat. 910-11.)

The learned Court of Appeals concluded that the above noted amendment confirmed its interpretation of Section 4 of the 1947 amendment, saying:

"It is not difficult to perceive that this amendment was predicated upon recognition by Congress that, under some circumstances and conditions, changing clothes and washing may be part of compensable 'principal activities.' It affords impressive confirmation of the interpretation of the Act in accordance with its legislative history."

(Opinion, p. 4)

The above amendment of 1949 originated with H. R. 3190 of the 81st Congress, First Session. This was a bill by Mr. Lesinski, Chairman of the House Committee of Education and Labor. This bill did not contain Section 3(o). Mr. Lesinski's committee issued a committee report, No. 1267, to accompany the bill and, of course, it contained no reference to Section 3(o). Mr. Lucas from Texas introduced a bill on the same subject known as the Lucas bill and officially designated H. R. 4272. Then Mr. Herter introduced H. R. 4704 which provided in part as follows:

> "(n) Hours Worked.—In determining for the purposes of Sections 6 and 7 of the hours for which an employee is employed, there shall be excluded any time which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee."

As will be shown the Herter Bill was ultimately converted into Section 3(o) of the Act, as an amendment to the Lucas Bill during debate in the House.

* * * * * * *

"Mr. Herter: Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Herter to the Lucas substitute: Page 6, After line 12, insert a new paragraph as follows:

3(o) Hours worked: In determining for the purposes of Sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-

bargaining agreement applicable to the particular employee.

Mr. Herter: Mr. Chairman, this amendment is an amendment to the definitions under the Act. *It is offered for the purpose of avoiding another series of incidents which led to the Portal-to-Portal legislation and led to the overtime-on-overtime legislation.*

At the present moment there is a twilight zone in the determinations of what constitutes hours of work which have been spelled out in many collective-bargaining agreements but have not necessarily been defined in the same ways.

Let me be specific. In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take on the clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.

The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, 'You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as part of the working day.' That situation may arise at any moment. *This amendment is offered merely to prevent such a situation arising* and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment.

Mr. McConnel: Mr. Chairman, will the gentleman yield?

Mr. Herter: I yield to the gentleman from Pennsylvania.

Mr. McConnel: May I say to the distinguished gentleman from Massachusetts that I favor his amendment as offered.

Mr. Herter: I appreciate what the gentleman has said.

Mr. Lucas: Mr. Chairman, will the gentleman yield?

Mr. Herter: I yield to the gentleman from Texas.

Mr. Lucas: I do not oppose the gentleman's amendment, *although I must say about it as I have said about the Cooper amendment that I do not think it is necessary. The Portal-to-Portal Act was intended to cover just such situations as the gentleman describes. However, if the gentleman insists upon reenacting certain provisions of the Portal-to-Portal Act in this bill, I can offer no objection.*

Mr. Herter: The Gentleman's interpretation of the Portal-to-Portal Act, I am afraid, may not be shared by others who fear that there may be a loophole here.* That is all I am trying to cover, to avoid the kind of misunderstanding that arose before.

Mr. Lucas: It is my understanding that both the unions and management desire this amendment.

Mr. Herter: So I understand.

The Chairman: The question is on the amendment offered by the gentleman from Massachusetts.

The amendment was agreed to."

Congressional Record—House, August 10, 1949 page 11,433.

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*The "loophole" referred to by Mr. Herter on August 10, 1949, and which his amendment sought to cure is fully discussed in *Galvin* v. *National Biscuit Co.*, 82 F. Supp. 535. In this case there was an express contract calling for 15 minute clothes changing time. The proof, however, showed additional time was being spent by the employees and the suit was to secure pay for this additional time. The additional pay was denied.

Therefore, when the House Bill went to the Senate it contained the Herter amendment. Mr. Thomas, Chairman of the Committee on Labor and Public Welfare, introduced Senate Bill 653. This Senate Bill was substantially the same as the 2nd Lesinski Bill in the House and did not contain Section 3 (o) and, of course, the Conference Report contained no discussion of the subject matter in Section 3 (o). Apparently very little significance was attached to Section 3 (o), and Senator Ives prepared a draft which appears on the Congressional Record for August 22, 1949, at page 12,109 stating that neither the Lesinski Bill nor the Lucas Bill nor the Senate Bill 553 modify the Portal-to-Portal Act.

The Senate Bill was then amended and adopted with some variations and a Conference was had which issued Conference Report 1453 of the 81st Congress, 1st Session. This Conference Report describes Section 3 (o) as follows:

> "Hours Worked.— The House bill in Section 3 (o) *added a partial definition* of the term 'hours worked.' The Senate amendment did not contain an amendment on this subject. The conference agreement adopts the House provisions with an amendment. Under the section as passed by the House, for the purposes of the minimum wage and maximum hours provisions of the act, there would be excluded from 'hours worked' any time spent by the employee which was excluded from measured working time under a *bona fide* collective-bargaining conference agreement applicable to him or custom or practice thereunder. The conference agreement limits this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday."

The Conference Committee included Section 3 (o) in the Conference Bill which was ultimately passed and the

following is the only further debate that took place on Section 3 (o) which occurred in the House:

"Mr. Herter: The gentleman knows that I was very much interested in protecting the sanctity of collective-bargaining agreements entered into in good faith in determining working time by employees, and offered an amendment in order to clarify that situation. I notice that the conferees have amended that amendment in a way that is entirely unobjectionable to me, but I also notice on page 16 of the report, in discussing amendment made, the words 'hours worked,' are used a number of times and are put in quotation marks.

In view of the fact that Sections 6 and 7 of the bill to which the definition would apply never contained the particular words 'hours worked,' I am wondering whether those quotation marks have any special significance.

Mr. McConnell: They have no special significance except it is a referral to the term that was used in the report itself. There are no quotation marks around the 'hours worked' in the report. These were put in the statement because they refer to the term in the report.

Mr. Herter: I gather then that is merely a reference to a heading that appears at the beginning of the explanation?"

Congressional Record—House October 18, 1949, page 15,130.

Rather than confirming the interpretation given by the learned Court of Appeals to Section 4 of the Act, it would seem that the amendment of 1949, generally referred to as Section 3 (o), serves better to illustrate the *fundamental error* in the Court's conclusion. In the present case the Court held in substance that preliminary and postliminary activities, such as changing clothes and taking shower baths, if "so closely related to other duties performed by defendants' employees as to be an integral part

thereof" lose the character of preliminary and postliminary activities and, notwithstanding the time element, become *principal activities*. If this interpretation is given to the Act then under the 1949 amendment a portion of the principal activities of employees may be rendered non-compensable by custom or practice or under a collective bargaining agreement, since the 1949 amendment expressly provides:

> "In determining for the purposes of Sections 6 and 7 the hours for which an employee is employed, there shall be excluded *any time spent in changing clothes or washing at the beginning or end of each workday* which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective bargaining agreement applicable to the particular employee."

Surely Congress did not intend to permit compensable principal activities to be divided up or included or excluded by contracts between the employer and the employees, or by the changing customs and practice at the establishment in question.

In the light of the entire judicial and legislative history following the decision of this Court in the *Mt. Clemens Pottery* case, it would seem more reasonable that the 1949 amendment be construed as referring to *all* clothes changing and *all* washing "at the beginning or end of each work day", irrespective of the *relationship* or the *reasons* for such clothes changing and washing. It would seem that by the amendment of 1949 Congress has designated clothes changing and the taking of shower baths as *statutory preliminary and postliminary activities* which are excluded from working hours under Section 4 of the 1947 amendment but which *may be included* as compensable time by custom or practice at the establishment or under the terms of a *bona fide* collective bargaining agreement.

CONCLUSION.

For the foregoing reasons, Petitioners respectfully insist that the learned Court of Appeals for the Sixth Circuit was in error in its construction of the applicable statutes. The non-mandatory preliminary and postliminary activities of clothes changing and bathing, while beneficial to both employer and employee—and in that sense indispensable to the productive work of manufacturing batteries for automobiles—were nevertheless *preliminary* and *postliminary* to the productive work and therefore not a part of the principal activities for which compensation was due. For these reasons petitioners insist that the decision of the Court of Appeals for the Sixth Circuit should be reversed and the suit dismissed.

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Statutory Provisions Involved.

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C., Supp. V, 201 *et seq.*):

DEFINITIONS

SEC. 3. As used in this Act—

* * * * * * *

(o) Hours worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement

of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce; or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * * *

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such state-

ment, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251 *et seq.*:

* * * * * * *

SEC. 2.

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, be-

tween such employee, his agent, or collective-bargaining representative and his employer.

* * * * * * *

SEC. 4.

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in, on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such ac-

tivity, not inconsistent with a written or nonwritten contract in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.